IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 71-6481

CLIFFORD H. DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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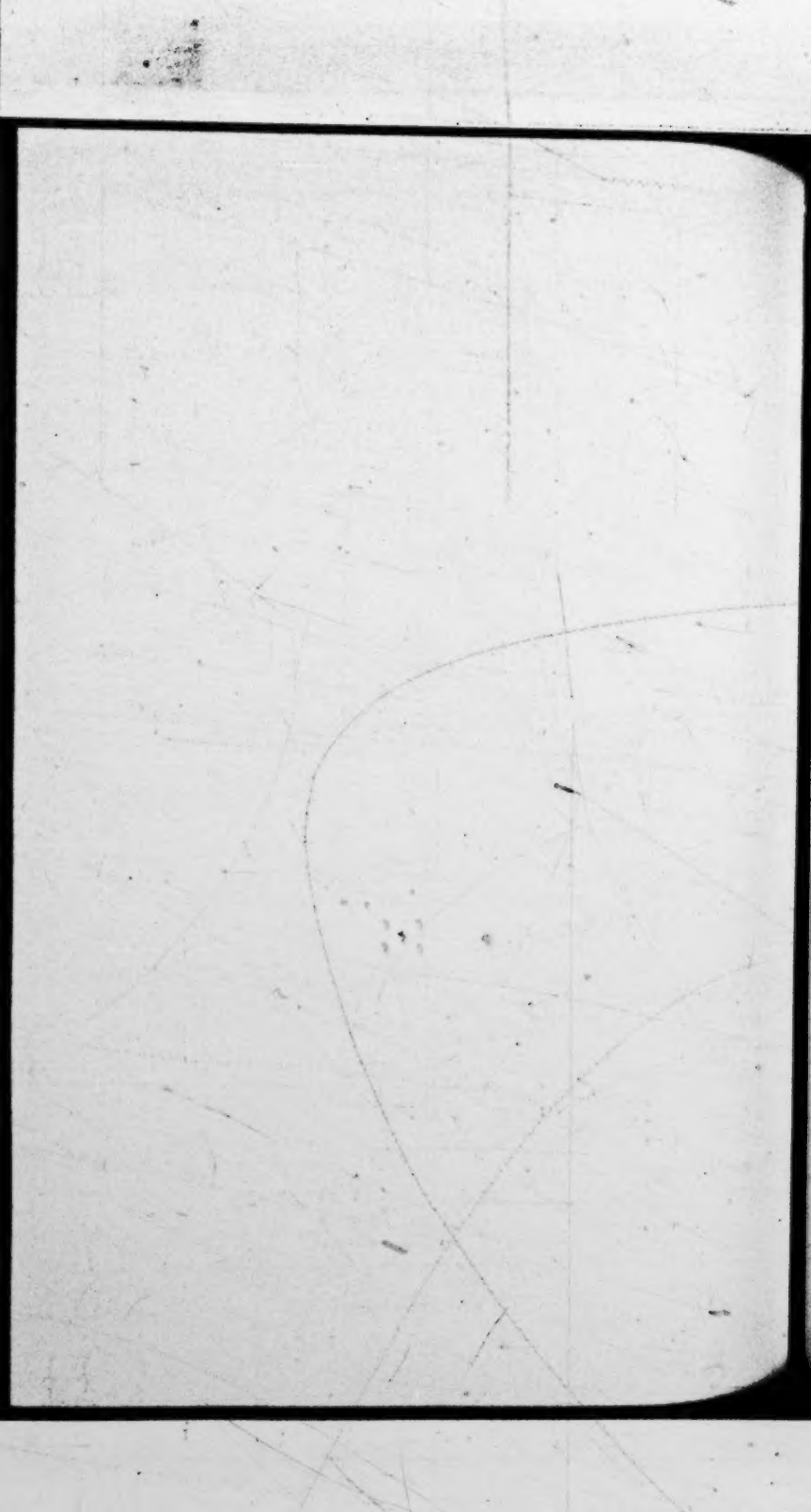

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REPLY BRIEF FOR PETITIONER

1. Since the United States is unable to surmount the unambiguous holdings of *Sanders* v. *United States,* 373 U.S. 1 (1963), and *Kaufman* v. *United States,* 394 U.S. 217 (1969), which import the *Noia* waiver doctrine to Sec. 2255 cases, and the equally unambiguous line of cases which have held racially exclusive grand juries unconstitutional for almost one hundred years, it proposes that the Court treat the systematic exclusion of Negroes from grand juries as mere harmless error (Br., pp. 19-20, 30, 33-34, 35, 39-41, 43 n. 34), and invites the Court to assign the prohibition against racial discrimination in grand jury selection to the dustbin. The government also asserts that jury selection in the Northern District of Mississippi is not infected by racial exclusion (Br., 18-19, n. 10), and in any case the petitioner is guilty (Br., 40).

These are all unusual assertions. They tell the Court that grand juries are only a charade, cf. *Hurtado* v. *California*, 110 U.S. 516, 551-555 (1884) (Harlan, J. dissenting); *United States* v. *Dionisio*, 41 U.S. Law Week 4180, 4184 note 15; that the Court need not bother to allow petitioner to test the exclusionary practices in the Northern District of Mississippi since it was shown in another case that juries are selected fairly in the Northern District of Mississippi, even though the racial exclusion issue was dropped from that case [Br. p. 18, n. 10];* and that a guilty verdict cures all pre-existing constitutional errors.

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* The issue may have been dropped because the defendants in that case were white (Brief on Behalf of Plaintiff in *United States* v. *Polk*, p. 2) and their attorneys might well have thought in 1968, well before *Peters* v. *Kiff*, 407 U.S. 493 (1972), that white defendants had no chance of persuading a court that they were entitled as a constitutional matter to complain about the exclusion of blacks from jury service.

As part of its proof that Negroes were not excluded from jury service in the Northern District of Mississippi, the United States has submitted affidavits from "sixty-seven trial attorneys who since 1964 have tried jury cases in the district court [of the Northern District of Mississippi]" (*Id.* at 7). Every one of those affidavits (with four minor exceptions) are identical to each other except for the material which identifies the affiants. Of the four exceptions, two (Attorneys Darden and Summers) do not include paragraph 3, and two (Attorneys Clayton and Farese) recite that they actually saw a given number of Negroes sitting on a petty jury in one case each. None of the other sixty-five attorneys make any similar concrete statistical references.

The standardized assertion in the affidavits that "non-white persons . . . have been represented on the venires in significant numbers" is comforting news if true, but we would first want to know what the sixty-seven affiants mean by "significant numbers." And for the purpose of exploring the questions raised by the Brief for Petitioner in the instant case at pp. 27-28, one would also be interested in asking those sixty-seven lawyers whether they ever raised the exclusion issue in the Northern District of Mississippi and, if not, the con-

2. The United States suggests that a hearing on the issue of waiver would also be a waste of time: "The district court found 'no plausible explanation of his failure to timely make his objection' and thus refused to disregard the waiver of the objection" (Br., p. 22). Of course the district court found no "explanation," since it declined to grant petitioner a hearing where the issue could be assessed on the basis of proof, rather than on the district court's speculation.

The United States mis-states another facet of the waiver problem by suggesting that lawyers can effectively waive their clients' constitutional rights (Br. 37), simply ignoring this Court's unanimous declaration less than a year ago that " . . . a waiver must be the product of an understanding and knowing decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel." *Humphrey* v. *Cady*, 31 L.ed. 2d 394, 407 (1972).

3. The United States says that "Unless this Court holds Rule 12(b)(2) of the Federal Rules of Criminal Procedure unconstitutional, the decision below must be sustained" (Br., p. 20). Petitioner makes no such argument. All the Court need do is construe the phrases "constitutes a waiver thereof" and "for cause shown" so that they reflect the *Noia* waiver doctrine. The government concedes, as it must, that the *Noia* doctrine was engrafted upon both the habeas statute and Sec. 2255 as a matter of statutory construction (Br. 30-31). The Court need do no more than that here.

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quote statistical facts upon which their decisions were based. But all those issues of fact require a forum in *this* case, not unilateral assertions from some other case.

4. The brief of the United States makes two plain misstatements of matters of fact. At p. 17 it says, "The use of the [keyman] system, as the Amicus Curiae acknowledges, 'has not . . . by and large [resulted in] deliberate exclusion of blacks' (Br. 19), but has instead resulted in 'unintentional' underrepresentation of Negroes and other groups on jury lists." In fact, Amicus Curiae did not use the word "underrepresentation." It used the word "excluding." There is a difference.

The second clear misstatement occurs at p. 11, n. 7 where the United States says that "petitioner apparently no longer challenges the findings of the two courts below made without a hearing, that he did not in fact make any pre-trial challenge to the selection of the grand jury and thus that the waiver provision of Rule 12(b)(2) is, by its terms, applicable to this case." But on p. 28 of his brief, petitioner clearly states that the question of the pre-trial challenge would be the first order of business at the hearing on remand, assuming there is one. Thus, petitioner has not dropped the claim but merely postponed it to await an evidentiary hearing, where it can be determined after taking of proof.

Respectfully submitted,

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